Tan Wei Ma & Ors v Pentadbir Tanah Daerah Gombak

HIGH COURT (SHAH ALAM) — LAND REFERENCE NO 15–79 OF 2009
MOHAMED ZAINI MAZLAN JC
20 APRIL 2015

Land Law — Acquisition of land — Compensation — Dissatisfaction and objections over amount of compensation — Whether valuer's report and additional rebuttal report have proven prima facie case to show award inadequate — Whether reflected market value — Whether award for injurious affection for non-acquired part of land given — Whether costs should be awarded for reclamation land filling earthworks, and for building retaining wall — Land Acquisition Act 1960

Part of the applicants' land was acquired under the Land Acquisition Act 1960 ('the Act') the applicants were awarded RM444,000 in compensation by the respondent. Dissatisfied with the award, the applicants filed their objections and submitted that the amount was not satisfactory and did not reflect the market value; no award was given for injurious affection for the non-acquired part of the land; costs should be awarded for reclamation, land filling earthworks, and for building the retaining wall; and that the acquired land was for commercial usage. A land reference was scheduled for hearing but the applicants filed this application ('the applicants' application'), where it sought for a ruling on whether the applicants, based on the applicants' valuer's report and additional rebuttal report filed have proven a prima facie case to show that the award awarded by the land administrator was inadequate ('the first issue'); whether the applicants, based on the applicants' valuer's report and additional rebuttal have proven a prima facie case for injurious affection claim ('the second issue'); whether the respondent's valuer's and rebuttal report should be disregarded due to failure to find support for their statements in their reports with evidence ('the third issue'); and for a direction be given that the respondent shall not file any valuer's report or rebuttal reports, for the purpose of the hearing of this land reference ('the fourth issue').

Held, dismissing the application with costs of RM2,000:

(1) Section 40A(1) of the Act stipulates that in a matter pertaining to the amount of compensation, the court shall consist of two assessors, who shall assist the judge in determining a fair and reasonable amount of compensation. A High Court judge is not an expert in determining the value of a land, as valuation of land is not a mathematical process, hence the requirement set out under s 40A(1) of the Act (see para 21).

(2) The applicants, in seeking for a determination of the first to third issues, was, in essence, seeking to bypass the decision-making process of a land reference court comprising of a judge and two assessors. If the court ruled in the applicants' favour, it will essentially cement the applicants' claim that the award was inadequate. This would be contrary to the provisions of s 40D(1) of the Act (see para 22).

(3) The first and second issues were not entirely legal issues. The same applied to the third issue. These issues, once determined, will lead to a finding as to whether the compensation awarded was sufficient. It will be necessary for the assessors to consider and provide their opinion on the various heads of compensation claimed by the applicants as provided under s 40C of the Act (see para 24).

(4) The question of whether the applicants have substantiated the amount claimed for injurious affection was an issue of compensation, and could only rightly be decided by this court comprising of two assessors. The opinion of the assessors were necessary for this court to make a finding on these three issues, for the evidence that would be in the realm of the assessors' expertise will need to be considered. The valuers' report submitted by both parties would contain matters such as the market value on a comparative basis, injurious affection, to name a few. This was expressly provided for under para 2 of the First Schedule of the Act, where several matters that should be taken into consideration are set out, such as market value, injurious affection and so on (see paras 25 & 29).

[Bahasa Malaysia summary

Sebahagian daripada tanah pemohon-pemohon diambil alih di bawah Akta Pemerolehan Tanah 1960 ('Akta'), pemohon-pemohon diawardkan sebanyak RM444,000 sebagai pampasan oleh responden. Tidak puas hati dengan award, pemohon-pemohon memfailkan bantahan mereka dan berhujah bahawa jumlah tersebut tidak memuaskan dan tidak membayangkan nilai pasaran; tiada award diberikan untuk kesan mudarat untuk bahagian tanah yang tidak diambil alih; kos patut diawardkan untuk penebusgunaan, kerja-kerja tambakan tanah, dan untuk membina dinding penahan; dan bahawa tanah yang diambil alih adalah untuk penggunaan komersial. Rujukan tanah dijadualkan untuk pendengaran tetapi pemohon-pemohon memfailkan permohonan ini ('permohonan pemohon-pemohon'), di mana ia memohon untuk perintah atas sama ada pemohon-pemohon, berdasarkan laporan penilai pemohon-pemohon dan laporan pematahan tambahan yang difailkan telah membuktikan kes prima facie untuk menunjukkan bahawa award yang diawardkan oleh pentadbir tanah tidak mencukupi ('isu pertama'); sama ada pemohon-pemohon, berdasarkan ke atas laporan penilai pemohon-pemohon dan pematahan tambahan telah membuktikan kes prima facie untuk tuntutan kesan mudarat ('isu kedua'); sama ada penilai responden dan laporan pematahan patut tidak dipedulikan akibat kegagalan untuk mendapatkan

sokongan untuk penyataan mereka di dalam laporan mereka dengan keterangan ('isu ketiga'); dan untuk arahan diberikan bahawa responden tidak akan memfailkan apa-apa laporan penilai atau laporan pematahan, bagi tujuan pendengaran rujukan tanah ini ('isu keempat'). A

Diputuskan, menolak permohonan dengan kos sebanyak RM2,000: B

(1) Seksyen 40A(1) Akta menetapkan bahawa dalam perkara berkaitan kepada jumlah pampasan, mahkamah akan terdiri daripada dua penilai, yang akan membantu hakim dalam menentukan jumlah adil dan munasabah pampasan. Hakim Mahkamah Tinggi juga bukan pakar dalam menentukan nilai tanah, kerana penilaian tanah bukan proses matematik, maka kehendak yang ditetapkan di bawah s 40A(1) Akta (lihat perenggan 21). C

(2) Pemohon-pemohon, dalam memohon untuk penentuan isu-isu pertama hingga ketiga, pada dasarnya, memohon untuk melangkau proses membuat keputusan mahkamah rujukan tanah yang terdiri daripada seorang hakim dan dua penilai. Jika mahkamah memutuskan memihak pemohon-pemohon, ia akan secara dasarnya mengukuhkan tuntutan pemohon-pemohon bahawa award tidak mencukupi. Ini akan bertentangan kepada peruntukan s 40D(1) Akta (lihat perenggan 22). D E

(3) Isu-isu pertama dan kedua bukan secara keseluruhannya isu-isu undang-undang. Ia juga terpakai kepada isu ketiga. Isu-isu ini, apabila sahaja ditentukan, akan membawa kepada dapatan kepada sama ada pampasan yang diawardkan adalah mencukupi. Adalah perlu untuk penilai-penilai mempertimbangkan dan memberikan pandangan mereka atas pelbagai kepala pampasan yang dituntut oleh pemohon-pemohon di bawah s 40C Akta (lihat perenggan 24). F

(4) Soalan sama ada pemohon-pemohon telah mengesahkan jumlah yang dituntut untuk kesan mudarat adalah isu pampasan, dan hanya dengan betul diputuskan oleh mahkamah ini yang terdiri daripada dua penilai. Pandangan penilai-penilai adalah perlu untuk mahkamah ini membuat dapatan di atas ketiga-tiga isu ini, kerana keterangan yang akan berada dalam kepakaran penilai-penilai akan diperlukan untuk dipertimbangkan. Laporan penilai yang diserahkan oleh kedua-dua pihak akan mengandungi perkara-perkara seperti nilai pasaran atas dasar perbandingan, kesan mudarat, dan lain-lain lagi. Ini dinyatakan dengan jelas di bawah perenggan 2 Jadual Pertama Akta, di mana beberapa perkara yang patut dipertimbangkan ditetapkan, seperti nilai pasaran, kesan mudarat dan lain-lain (lihat perenggan 25 & 29).] G H I

Notes

For cases on compensation, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 2301–2355.

Cases referred to

Jitender Singh a/l Pagar Singh & Ors v Pentadbir Tanah Wilayah Persekutuan and another appeal [2012] 1 MLJ 56, CA (refd)

Jitender Singh Pagar Singh & Ors v Kerajaan Malaysia [2010] 8 CLJ 1001, HC (refd)

Le Hazen Resources Sdn Bhd v Land Administrator of Federal Territory Kuala Lumpur [2012] 9 MLJ 671, HC (refd)

Loh Ah Hoi & Anor v Pemungut Hasil Tanah, Kedah [1996] MLJU 50, HC (refd)

Malakoff Bhd & Anor v Pentadbir Tanah, Kedah [2004] 1 MLJ 569, FC (refd)

Sebekai Plantation Sdn Bhd v The Superintendent, Lands and Surveys, Bintulu Land Reference No 15–04 of 2008 (BTU) (unreported), HC (refd)

Superintendent of Lands and Surveys Department Sibu Division & Anor v Usang ak Labit & Ors and another appeal [2014] 3 MLJ 519, CA (refd)

Legislation referred to

Land Acquisition Act 1960 s 40A, 40A(1), 40C, 40D(1), First Schedule, Third Schedule

Raymond Mah Mun Kit (Mak Ka Wai with him) (Mah Weng Kwai & Assoc) for the applicants.

Etty Eliany bt Tesno (Legal Officer, Selangor Legal State Offices) for the respondents.

Mohamed Zaini Mazlan JC:

INTRODUCTION

[1] Part of the applicants land were acquired for the 'Tapak Projek Skim Bekalan Dan Pengagihan Air Langat II – Fasa 1 (Cadangan Jajaran Paip Air Corridor Utara) Mukim Hulu Kelang, Daerah Gombak, Negeri Selangor' under the Land Acquisition Act 1960 ('the LAA 1960'). Not satisfied with the compensation awarded, the applicants took steps to submit their objections.

[2] The applicants have filed several interlocutory applications that have since been heard and decided. With this latest application, the applicant is seeking leave to address this court, consisting of a judge sitting alone pursuant to s 40A of the LAA 1960, for a ruling on issues set out in their application.

[3] The pertinent issue is whether the issues in the applicants' application, should be heard and decided by a judge sitting alone under the provisions of the LAA 1960.

BACKGROUND FACTS

[4] A declaration to acquire the land under the LAA 1960 was made on the 20 December 2007. The respondent awarded the applicants a sum of RM444,000 as compensation. The applicants being dissatisfied with the award, filed their objection on the 6 January 2009. The applicants' objections were premised on the following grounds:

(a) that the amount of compensation was not satisfactory, and did not reflect the market value;

(b) no award was given for injurious affection for the non-acquired part of the land;

(c) costs should be awarded for reclamation, land filling earthworks, and for building the retaining wall; and

(d) that the acquired land was for commercial usage, and that the award was not reflective of its market value. This particular ground was a question of law.

[5] The chronology of events that followed are as follows:

26 November 2010	The acquired land was held to be an agricultural land with commercial potential.
8 April 2011	Based on the earlier decision of the 26 November 2011, the valuer's reports and submission of parties, the market value of the land was increased to RM484 per sqmt, and an increase of RM272,320 was awarded to the applicants. No award was given for injurious affection.
The hearings were presided by Zainal Azman bin Abd Aziz J.	
26 November 2010	The applicants appealed to the Court of Appeal in respect of the decision delivered on the 26 November 2010, pertaining to the category of land use, and the decision of the 8 April 2011, which was in respect of injurious affection.
24 June 2013	The Court of Appeal allowed the applicants' appeal, and ordered for this land reference to be heard before another High Court judge and a new panel of assessors.
19 December 2013	The applicants filed an application in the High Court, to add the following issues to their grounds of objection: (a) a claim for injurious affection for the non-acquired part of the land; (b) a claim for injurious affection for the adjoining land that also belonged to them; and

	(c) that the valuation of the acquired land and the claim for injurious affection, be based on the category of building land, following the Court of Appeal's decision.
6 February 2014	The applicants' application was allowed.
21 March 2014	The applicants filed another application for the court to decide on the following issue of law: 'Whether the respondent is required to support the statements and conclusions in its valuer's report and rebuttal report with evidence, and if so, the consequences in law of the failure to do so'.
3 April 2014	The question of law posed by the applicants was answered in the affirmative, where it was held that any statement of conclusion that is not supported by evidence, should be accorded little, or no weight, in the assessment of compensation.

These two applications by the applicants were heard and decided by Vernon Ong J (now JCA).

[6] The land reference was scheduled for hearing on the 30 October 2014. However, the applicants had on the 1 October 2014, filed this application ('the applicants' application'), where it sought for a ruling on the following:

(a) whether the applicants, based on the applicants' valuer's report filed on the 19 March 2014, and the applicants' additional rebuttal report filed on the 10 September 2014, have proven a prima facie case, to show that the award awarded by the land administrator was inadequate, ('the first issue');

(b) whether the applicants, based on the applicants' valuer's report filed on the 19 March 2014 and the applicants' additional rebuttal report filed on the 10 September 2014, have proven a prima facie case for injurious affection claim, ('the second issue');

(c) whether the respondent's valuer's report filed on the 4 March 2014, and the rebuttal report filed on the 19 March 2014, should be disregarded, because the respondent failed to support their statements in their reports with evidence, ('the third issue'); and

(d) a direction be given that the respondent shall not file any valuer's report or rebuttal reports, for the purpose of the hearing of this land reference fixed on the 30 October 2014, ('the fourth issue').

THE APPLICANTS' CASE

The first issue

[7] The first issue that the applicants have sought for a ruling, is whether they have proven a prima facie case to show that the award awarded by the land administrator was inadequate, based on the applicants' valuer's report and additional rebuttal report.

[8] The applicants' submit that they had pursuant to the Court of Appeal's ruling that the acquired land be categorised as building land, provided suitable comparable sales to establish the true market value of the acquired land. They also contend that their valuer's reports, have supported each and every single claim made in the report with evidence.

[9] The applicants relied on the case of *Sebekai Plantation Sdn Bhd v The Superintendent, Lands and Surveys, Bintulu* Land Reference No 15–04 of 2008 (BTU) (unreported), where the court held that a party claiming for an enhanced compensation must produce evidence to support it's claim that the award is inadequate, and if the party concerned succeeds in showing prima facie that the award is inadequate, the acquiring party must then support the award by producing evidence.

[10] The applicants also referred to the case of *Loh Ah Hoi & Anor v Pemungut Hasil Tanah, Kedah* [1996] MLJU 50 (HC), where Mohd Hishammuddin J (now JCA), held that the court was under a duty to evaluate the applicants' valuation report and the evidence produced, and that the court will accept the valuation of the former's valuer, if it had succeeded in establishing a prima facie case.

The second issue

[11] The second issue is quite similar to the first issue, in that the applicants are also seeking for a ruling that their valuer's report and additional rebuttal report have proven a prima facie case, in respect of their claim for injurious affection. The claim for injurious affection is in respect of the reduction of the area that could be developed, and the higher costs to develop the non-acquired part of the land, which is a hilly area.

[12] The applicants sought to rely on the ruling made by Vernon Ong J on the 3 April 2014, where the learned judge in allowing the applicants' application, held that any statement of conclusion that is not supported by any evidence, shall be accorded little, or no weight in the assessment of compensation.

[13] The applicants submit that Justice Vernon's Ong's ruling meant that the learned judge took the view that the applicants have proven a prima facie case for injurious affection, and that it is now incumbent on the respondent to provide sufficient evidence to rebut the applicants' claim.

[14] The applicants went on to conclude that the respondent's valuer has failed to provide satisfactory evidence to rebut the applicants' claim for injurious affection.

[15] The applicants referred to the case of *Superintendent of Lands and Surveys Department Sibu Division & Anor v Usang ak Labit & Ors and another appeal* [2014] 3 MLJ 519 (CA). The Court of Appeal had in that case, held that the burden of adducing evidence to rebut shifts to the other party, once the plaintiff succeeds in adducing some evidence that is not incredible.

[16] The applicants also relied on the Federal Court's decision in the case of *Malakoff Bhd & Anor v Pentadbir Tanah, Kedah* [2004] 1 MLJ 569 (FC), where the apex court held that the respondent's failure to challenge the appellant's claim for injurious affection was fatal.

The third issue

[17] As for the third issue, the applicants also relied on Justice Vernon Ong's 3 April 2014 ruling, and contend that the respondent's valuer's report and rebuttal report should be totally disregarded, as the reports are not supported by evidence.

The fourth issue

[18] The final issue for determination is whether the respondent should be barred from filing any further valuer's or rebuttal reports before the hearing of the land reference. The applicants take the view that any further reports filed will serve to delay the hearing.

[19] There would be no necessity to make a ruling on the fourth issue, as the respondent's counsel had at the hearing of this application, stated that the respondents will not be filing any further valuation report. It has as such ceased to become a moot point.

FINDINGS

[20] The first, second and third issues can be addressed simultaneously, as the applicants are in essence seeking for this court, with a judge sitting alone

under s 40A of the LAA 1960, to make a determination, or a finding, on the issues that they have set out.

[21] The first question that arises is whether this application should be heard and decided by a court consisting of a judge sitting alone, or by the court consisting of a judge and two assessors. Section 40A(1) of the LAA 1960 stipulates that in a matter pertaining to the amount of compensation, the court shall consist of two assessors, who shall assist the judge in determining a fair and reasonable amount of compensation. A High Court judge is not an expert in determining the value of a land, as valuation of land is not a mathematical process, hence the requirement set out under s 40A(1) of the LAA 1960 and *Jitender Singh a/l Pagar Singh & Ors v Pentadbir Tanah Wilayah Persekutuan and another appeal* [2012] 1 MLJ 56 (CA).

[22] The applicants, in seeking for a determination on whether they have established a prima facie case, to show that the land administrator's award was inadequate (the first issue), and whether they have also proven a prima facie case for their injurious affection claim (second issue), and for a ruling to disregard the respondent's valuer's reports (third issue), is in essence, seeking to bypass the decision making process of a land reference court comprising of a judge and two assessors. Should I rule in the applicants' favour, it will essentially cement the applicants' claim that the award was inadequate. This will be contrary to the provisions of s 40D(1) of the LAA 1960, which states as follow:

> In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.

[23] The applicants contend that issues of fact and the heads of claim for an assessment of compensation, are to be decided by the court consisting of a judge sitting alone, and cited the case of *Le Hazen* in support. In *Le Hazen*, the learned judicial commissioner addressed what she deemed as two legal issues, firstly, the size of the land that was acquired, and secondly, whether the there was an implied condition that the acquired land was to be used for building or agricultural purposes.

[24] With respect, the issues that the applicants have posed here are distinct. The applicants in the first issue is seeking for a prima facie ruling, that the award was inadequate, and in the second issue that they have proven a prima facie case for injurious affection. These are not entirely legal issues. The same applies for the third issue in seeking for a ruling that the respondent have failed to support their valuer's report with evidence. These issues once determined,

will lead to a finding as to whether the compensation awarded was sufficient. It will be necessary for the assessors to consider and provide their opinion on the various heads of compensation claimed by the applicants as provided under s 40C of the LAA 1960.

[25] The opinion of the assessors are necessary for this court to make a finding on these three issues, for the evidence that would be in the realm of the assessors' expertise will need to be considered. The valuers' report submitted by both parties would contain matters such as the market value on a comparative basis, injurious affection, to name a few. These are matters that would require this court, with the aid of two assessors to come to a finding. This is expressly provided for under para 2 of the First Schedule of the LAA 1960, where several matters that should be taken into consideration are set out, such as market value, injurious affection and so on.

[26] Furthermore, para 2(1) of the Third Schedule to the LAA 1960, stipulates that an applicant's valuer's report must establish a prima facie case. That however, is only the first stage, as para 2(2) of the same schedule states that any oral evidence by the applicant's valuer can further be adduced by way of cross-examination or re-examination. It would as such be crucial for the trial to be concluded first before this court comprising, of a judge together with two assessors, who will then be able to make a finding, whether the applicants have firstly established a prima facie case, and secondly, whether the respondent's valuer's reports have sufficiently rebutted the applicants' valuer's reports. This is the procedure set out under para 2 of the Third Schedule of the LAA 1960. Furthermore, there may be further evidence adduced, should the applicants' valuer, as well as the respondent's valuer, be subjected to cross-examination and re-examination; para 2(2) of the Third Schedule of the LAA 1960.

[27] The applicants also seeks to rely on Justice Vernon Ong's ruling in their earlier application, where they had sought for a ruling on 'Whether the respondent is required to support the statements and conclusions in its valuer's report and rebuttal report with evidence, and if so, the consequences in law of the failure to do so'. Justice Vernon Ong in ruling that a statement of conclusion that is not supported by evidence, should be accorded little, or no weight in the assessment of compensation, had in my opinion, stated the obvious. It is of course necessary for the respondent to support their report with evidence, and that a failure on their part would be to their detriment. I disagree with the applicants' counsel's submission that Justice Vernon Ong had made a finding that the applicants have proven a prima facie case. His Lordship's ruling does not support that proposition.

[28] The applicants had also sought to rely on the case of *Loh Ah Hoi*, where it was held that the court was under a duty to examine the applicant's valuation

report and the evidence of their valuer. The applicants however, omitted to highlight the fact that the learned judge had only made a finding that the applicants had failed to establish a prima facie case after the valuer had been subjected to cross-examination. More notably, the learned judge had in that case sat alone, as the provisions for a judge to be assisted by two assessors under s 40A of the LAA 1960, had only been included under the Land Acquisition (Amendment) Act 1997 ('Act A575'), which came into effect from 1 February 1998.

[29] The question of whether the applicants have substantiated the amount that they are claiming for injurious affection is an issue of compensation, and can only rightly be decided by this court comprising of two assessors.

CONCLUSION

[30] At the High Court level for the case of *Jitender Singh Pagar Singh & Ors v Kerajaan Malaysia* [2010] 8 CLJ 1001 (HC), Aziah Ali J (now JCA), held as follows:

> The law accords the judge with two experts whose sole role is to decide the amount of compensation after having considered the documentary evidence including the valuation reports of both parties and the submissions made. The duty of the two assessors is therefore limited to that extent. The law does not contemplate that the judge is merely to preside without listening to the evidence hence becoming to what counsel for the plaintiffs terms as merely 'a rubber stamp'. There is no abdication of duty by the judge *as he is obliged to hear the evidence and submissions together with the two assessors*. (Emphasis added.) (at p 1011).

The Court of Appeal affirmed the High Court's decision, and held that the determination of the market value of the land acquired, and the amount of compensation to be awarded, is to be based on the opinion of the experts, namely the valuers.

[31] The determination as to whether the applicants have proven a prima facie case, or whether the respondents have substantiated their the statements in their valuer's report and rebuttal report with evidence, should be addressed and decided after a full trial consisting of a judge and two assessors.

[32] The applicants' application is dismissed with costs of RM2,000.

Application dismissed with costs of RM2,000.

Reported by Afiq Mohamad Noor